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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. BARNEY,
PETITIONER,

v.

R. L. HALPERIN, STATE TAX ASSESSOR,
RESPONDENT.

On Writ of Certiorari to the Supreme Judicial Court Of the State of Maine

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

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I

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Section 106 of the Buck Act (4 U.S.C. §§105-110) constituted a re-ceding by the Federal Government to the states of jurisdiction to tax income earned by a nonresident in a Federal area located within the state or whether Section 106 was not a grant of taxing jurisdiction but merely waived sovereign immunity barring such taxation provided that the state (or other taxing authority) possessed the necessary jurisdiction to tax independently of the Buck Act?

(2) Whether a state may, without violating the Privileges and Immunities Clause of the Constitution of the United States, require that the exemptions and deductions available to all taxpayers be reduced in the case of a nonresident (but not a resident) who has income subject to taxation in the state, by the same percentage by which the nonresident's total income (as reported on the nonresident's federal income tax for the same year) exceeds the nonresident's income subject to taxation in the state (including a requirement that if the nonresident and spouse filed a joint federal income tax return for the same year, then the nonresident and spouse must file a joint income tax return in the state notwithstanding that the spouse is also a nonresident and had income reported on their joint federal income tax return for the same year but not income subject to taxation in the state).

TABLE OF CONTENTS

	Page
Questions Presented	I
Table of Contents	III
Table of Authorities	IV
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
I. This Court Should Grant Certiorari With Regard To The Issue Of Whether Maine Has Jurisdiction To Tax The Income Of Nonresidents Earned From Employment On This Federal Reservation	5
A. The Maine Court Has Decided A Substantial Federal Question In A Manner Not In Accord With An Applicable Decision Of This Court	5
1. This Appeal Presents A Substantial Federal Question	5
2. The Holding Of The Maine Supreme Judicial Court Is In Conflict With A Decision Of This Court	6
II. This Court Should Grant Certiorari With Regard To The Issue Of Whether Maine's Prorating Of Deductions And Exemptions With regard To Non-Residents Violates The Privileges And Immunities Clause Of The United States Constitution	12
A. The Maine Court's Decision Sustaining The Constitutionality Of Maine's Proration Statutes Presents An Important Federal Question Which Has Not Been Heard By This Court	12

Page

B. The Maine Court's Decision Sustaining The Constitutionality Of Maine's Proration Statutes Conflicts In Principle With Prior Decisions Of This Court 14

Conclusion 22

Appendix A-1

TABLE OF AUTHORITIES

Cases

Austin v. *New Hampshire*, 420 U.S. 656 (1975) 15, 17

Berry v. *State Tax Comm'n*, 241 Or. 580, 397 F.2d 780 (1964), reh. den., 241 Or. 588, *app. dis'd.*, 382 U.S. 16 (1965) 13

Caban v. *Mohammed*, 441 U.S. 380 (1979) 14

Dewey v. *Diamond*, 173 U.S. 193 (1899) 21

Edelman v. *Jordan*, 415 U.S. 651 (1974) 14

Edwards v. *Comm'r of Intern. Revenue*, 660 F.2d 1268 (9th Cir. 1982) 22

First Agricultural National Bank v. *State Tax Commission*, 392 U.S. 339 (1968) 6

Fishgold v. *Sullivan Corp.*, 328 U.S. 275 (1946) 10

Foster v. *Dravo Corp.*, 420 U.S. 92 (1975) 10

Friedsam v. *State Tax Comm'n*, 470 N.Y.S. 848 (App. Div. 1983) 13, 17

Golden v. *Tully*, 452 N.Y.S.2d 748 (App. Div. 1982) *aff'd mem.*, 58 N.Y.2d 1047 (1983) 13

Goodwin v. *State Tax Comm'r*, 286 App. Div. 694, 146 N.Y.S.2d 303 (1955), *aff'd* 1N.Y.2d 680 (1956) 13, 18

Hicks v. *Miranda*, 433 U.S. 332 (1975) 13

Page

Hoeper v. *Tax Comm. of Wisconsin*, 284 U.S. 206 (1931). 21
Howard v. *Commissioners of the Sinking Fund*, 344 U.S. 624 (1953) 5, 6, 7
J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 5
Kiker v. *Philadelphia*, 346 Pa. 624, 31 A.2d 289 (Pa.), *cert. denied*, 320 U.S. 742 (1943) 10, 11
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 10
Lorillard v. *Pons*, 434 U.S. 575 (1978) 10
Lung v. *O'Chesky*, 94 N.M. 602, 617 P.2d 1317 (1980), *app. dismissed*, 450 U.S. 961 (1981) 12, 13
Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307 (1976) 14
Morse v. *Johnson*, 282 A.2d 597 (Me. 1971) 3, 4, 6, 7, 10
Mouton v. *Sinclair Oil & Gas Co.*, 410 F.2d 717 (5th Cir. 1969), *cert. denied*, 398 U.S. 957 (1970) 5
Rivera v. *Buscaglia*, 146 F.2d 461 (1st Cir. 1944) 7
Shaffer v. *Carter*, 252 U.S. 37 (1920) 12, 15
Shell Oil Co. v. *Mouton*, 410 F.2d 715 (5th Cir. 1969) ... 5
Spencer v. *South Carolina State Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386 (S.C.), *aff'd*, __U.S.__, 105 S. Ct. (1859) 13, 17
Stiles v. *Currie*, 118 S.E.2d 428 (N.C. 1961) 13
Toomer v. *Witsell*, 334 U.S. 385 (1948) 19
Travis v. *Yale and Town Mfg. Co.*, 252 U.S. 60 (1920) .. 12, 13, 17
United States v. *Lewisburg Area School District*, 539 F.2d 301 (3rd Cir. 1976) 6
United States v. *Mitchell*, 403 U.S. 190 (1970) 22
Ward v. *Maryland*, 79 U.S. 418 (1971) 16
Wood v. *Tawes*, 181 Md. 155, 28 A.2d 850, 853-54 (Md.), *cert. denied*, 318 U.S. 788 (1942) 9
Yerian v. *Hawaii*, 130 F.2d 786 (9th Cir. 1942) 7

Page

Constitutional Provisions

Amendment XIV, Section 1 of the United States Constitution. 3, 4
Article IV, Section 2, of the United States Constitution . . . 3, 4, 12

Statutes

1822 Maine Laws 146 3
1863 Maine Laws 205 3
3 M.R.S.A. §§161-163 22
36 M.R.S.A. §5140 20
36 M.R.S.A. §5141 . . . . . 3, 20
36 M.R.S.A. §5144-A 3, 12, 18
36 M.R.S.A. §5145 . . . . . 3, 12, 18, 20
N.H. R.S.A. §4601 22
53 Stat. 575 7
4 U.S.C. §106 . . . . . 4, 5, 7
4 U.S.C. §111 7
29 U.S.C. §626(c) 10
50 U.S.C. app. §459(c)(2) 10

Other

Some Reflections on the State Taxation of Nonresident's Personal Income, 72 Mich. L. Rev. 1307, 1332 (1974) 18
Nonresident Personal Income Tax: A Comparative Study in Eight States, 29 Fordham L. Rev. 105, (1960) 18
S. Rep. No. 112, 76 Cong., 1 Sess. 7

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ROBERT W. BARNEY,
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R. L. HALPERIN, STATE TAX ASSESSOR,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

Robert W. Barney, petitioner, hereby petitions for a writ of certiorari from the final judgment of the Supreme Judicial Court of Maine, sitting as the Law Court, dated and entered April 2, 1985, holding the Maine income tax laws constitutional in all respects as applied to petitioner, affirming the judgment of the Superior Court of York County.

Opinions Below

The opinion of the Maine Supreme Judicial Court is not yet reported and is reproduced herein as Appendix B. The opinion rendered by the Superior Court of York County is unreported and is reproduced herein as Appendix A.

Jurisdiction

The judgment of the Maine Supreme Judicial Court was entered on April 2, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions and Statutes Involved

The following Constitutional and Statutory provisions are reproduced as Appendix C:

Amendment XIV, Section 1, of the United States Constitution.

Article IV, Section 2 of the United States Constitution.

4 U.S.C. §106

53 Stat. 575

4 U.S.C. §111

1822 Maine Laws 146

1863 Maine Laws 205

36 M.R.S.A. §5140
§5141
§5142
§5144-A
§5145

Statement of the Case

Petitioner Robert W. Barney ("Barney") and his spouse are residents of New Hampshire. Barney is employed at the Portsmouth Naval Shipyard ("the Shipyard"). [Appendix (hereinafter "App.") A-5]. The Shipyard is a federal reservation located within the boundaries of Maine, and lies upon Seavey and Dennett's Island in the Pisquataqua River.

In 1822 and 1863, Maine had ceded to the United States jurisdiction over these two islands, retaining only concurrent

jurisdiction for the execution of civil and criminal process. 1822 Maine Laws 146; 1863 Maine Laws 205. Maine reserved to itself no jurisdiction whatsoever in respect of taxation, including income taxation. *Morse* v. *Johnson*, 282 A.2d 597 (Me. 1971).

Because the Barneys filed joint federal income tax returns for 1980 and 1981, they were required under Maine law to file joint Maine income tax returns for those years. 36 M.R.S.A. 5141(2). In principal part due to the inclusion of Mrs. Barney's income, the income stated in said returns was derived from both Maine and New Hampshire sources. Therefore, the Barneys were required under Maine law to prorate their itemized deductions and personal exemptions by the ratio of income earned in Maine to total income earned. 36 M.R.S.A. §§5144-A & 5145. Maine does not similarly require the prorating of itemized deductions and personal exemptions as to residents who likewise have income not taxable by Maine.

The Barneys timely filed claims for refunds of 1980 and 1981 Maine income taxes based upon the arguments that (1) Maine was and is without jurisdiction to tax the income of nonresidents earned at the Shipyard, a federal reservation, and (2) that the prorating of deductions and exemptions unconstitutionally discriminates against nonresidents in favor of residents, in violation of the Privileges and Immunities Clause of the United States Constitution. The state denied the Barneys' refund claim (App. A-5) and the instant suit was timely filed in response to said denial.

The federal questions herein presented were raised at various stages of the Superior Court proceeding. Barney's Petition alleges (1) that Maine has no taxing jurisdiction over nonresidents employed at the Portsmouth Naval Shipyard (¶8(a)) and that said taxation thus violates the Due Process Clause of the 14th Amendment to the United States Constitution (¶8(b)), and (2) that Maine's requirement that nonresidents prorate their itemized deductions and exemptions where said nonresidents have income not taxable by

Maine is violative of the Privileges and Immunities Clause of the United States Constitution (¶11(a)-(b)). These issues were again squarely raised and presented in both the Brief on Behalf of Petitioner Robert Barney and the Reply Brief on Behalf of Petitioner Robert W. Barney, and on oral argument.

The Superior Court ruled that, as to the issue of jurisdiction to tax, it was bound by the 1971 decision of the Maine Supreme Judicial Court in *Morse* v. *Johnson*, 282 A.2d 597 (Me. 1971), ruling that the Buck Act, 4 U.S.C. §106, re-ceded the necessary taxing jurisdiction to Maine. (App. A-1). As to the issue of prorating, the court ruled that Maine's prorating statutes were justifiable as an attempt to achieve two "permissible goals": that of taxing income produced in the state even when it is earned by a nonresident and that of permitting a nonresident to take only those deductions connected with income arising from sources within the taxing state. (App. A-2).

Barney filed a timely appeal to the Maine Supreme Judicial Court. (App. A-5). The issues raised herein were squarely presented to that court in the Brief for the Appellant and orally, and the court affirmed the rulings of the Superior Court, ruling, as to the issue of jurisdiction, that the Buck Act "removed the dam of federal exclusivity. . ., allowing Maine's jurisdiction to flow back" (App. A-6), and ruling, as to the issue of prorating, that the Maine statutes were constitutionally permissible. (App. A-9).

Reasons for Granting the Writ

I. THIS COURT SHOULD GRANT CERTIORARI WITH REGARD TO THE ISSUE OF WHETHER MAINE HAS JURISDICTION TO TAX THE INCOME OF NONRESIDENTS EARNED FROM EMPLOYMENT ON THIS FEDERAL RESERVATION

A. *The Maine Court Has Decided a Substantial Federal Question in a Manner Not in Accord with an Applicable Decision of This Court.*

As is explained below, the decision of the Maine Supreme Judicial Court presents a substantial federal question of interpretation of a federal statute, 4 U.S.C. §106. Further, the Supreme Judicial Court's construction of this statute conflicts with an applicable decision of this Court, *Howard* v. *Commissioner of the Sinking Fund*, 344 U.S. 624 (1953), and therefore that decision should not be permitted to stand. (*See* Section I(A)(2), *infra*.)

1. *This appeal presents a substantial federal question.*

The propriety of levying income taxes upon wages earned on a federal enclave by nonresident individuals, where exclusive jurisdiction over the enclave had been ceded to the United States government by the state taxing authority, presents a substantial federal question for decision under both Article I, Section 8, Clause 17 of the United States Constitution as well as a federal statute, Section 106 of the Buck Act, 4 U.S.C. §106. *Howard* v. *Commissioners of the Sinking Fund*, 344 U.S. 624 (1953); *Shell Oil Co.* v. *Mouton*, 410 F.2d 715 (5th Cir. 1969); *Mouton* v. *Sinclair Oil & Gas Co.*, 410 F.2d 717 (5th Cir. 1969), *cert. denied*, 398 U.S. 957 (1970).

The sole ground for decision of the Maine Supreme Judicial Court as to the jurisdictional issue was an interpretation of a Section 106 of the Buck Act. *See J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). In *Howard* v. *Commissioners of the Sinking Fund*, 344 U.S. 624 (1953), this court ruled that federal law, and not

state law, would govern the interpretation of the phrase "income tax" contained in the Buck Act. Similarly, in the more recent case of *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339 (1968), involving a statute that granted certain authority to tax national banks, this court pointed out that "we are not bound by the state court's characterization of the tax." 392 U.S. at 347.

2. *The holding of the Maine Supreme Judicial Court is in conflict with a decision of this Court.*

Both the Superior Court and the Maine Supreme Judicial Court failed to deal with the substantive arguments made by Barney with regard to Maine's jurisdiction to tax. Both courts relied upon the 1971 decision of the Maine Supreme Judicial Court in *Morse* v. *Johnson* (which purported to follow the ruling of *Howard, supra*); the Superior Court ruled that it was bound by said decision (App. A-1) and the Supreme Judicial Court merely reiterated the ruling of that case. (App. A-5 - A-6).

Morse v. *Johnson*, 282 A.2d 597 (Me. 1971), similarly involved an appeal by a nonresident employee of the Portsmouth Naval Shipyard from the state tax assessor's denial of the employee's petition for a tax refund. The Supreme Judicial Court there agreed with the taxpayer that Maine reserved no authority to tax incomes earned on the two islands when it ceded same to the federal government. *Id.* at 598. The Court then stated the "question to be decided is whether the Buck Act is a recession of that authority." *Id.* The Court ruled that the Buck Act was such a recession, on the authority of *Howard*.[1]

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[1] The Supreme Judicial Court also cited *United States* v. *Lewisburg Area School District*, 539 F.2d 301 (3rd Cir. 1976), in support of its decision. However, the focus of that opinion was on whether the tax at issue was or was not an "income tax" within the meaning of the statute, and the court did not there address the issue here involved, *i.e.*, the meaning of the "having jurisdiction" language of the statute.

However, the facts of *Howard* are in one very significant aspect distinguishable from the facts of the instant case, namely, that the taxing authority in *Howard* acquired the necessary jurisdiction to tax independently of (and subsequent to the passage of) the Buck Act by annexation of the land upon which the Ordnance Plant lies. That annexation supplied the necessary jurisdiction for the City of Louisville constitutionally to be permitted to tax the wages of nonresidents employed at the Plant. In the instant case, on the other hand, even the Maine Supreme Judicial Court agrees that, subsequent to the two 1800 cession acts, the state of Maine had no jurisdiction to tax incomes earned on the federal reservation, especially that earned by nonresidents. *Morse* v. *Johnson*, 282 A.2d at 598.

The Maine decisions fail to deal with the clear language of the Buck Act and fail to recognize the importance of the critical factual distinction between *Howard* and the instant case, namely, that the taxing authority in the instant case, the State of Maine, never acquired the necessary jurisdiction to tax independently of the Buck Act. Section 106 of the Buck Act provides as follows:

> No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, *having jurisdiction to levy such a tax*, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such areas; and *such* State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within *such* State to the same extent and with the same effect as though such area was not a Federal area.

(Emphasis added). The underscored language of the above statute means that the taxing authority, whether state or municipal, must have jurisdiction *independently* of the Buck Act to be able to tax the income of nonresidents employed at the federal reservation subsequent to passage of the Buck Act.

Because of this language, section 106 is not an affirmative grant of jurisdiction. The same phrase appears in the Public Salary Tax Act, 4 U.S.C. §111, enacted on April 12, 1939:

> The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory of possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority *having jurisdiction to tax such compensation*, if such taxation does not discriminate against such officer or employee because of the source of such compensation[2]

53 Stat. 575 (emphasis added).

In Senate Report No. 112, 76 Cong., 1 Sess., p. 11, it is stated in reference to the Public Salary Tax Act that:

> It will be noted that the consent extends to taxation not only by the State but also by other duly constituted taxing authorities, of the compensation of Federal officers and employees. Under this provision if any local government units have authority to and do impose income taxes, *tax may be imposed upon such compensation subject to the jurisdiction of such units.*

(Emphasis added). Thus, this statute conferred no jurisdiction where none previously existed. *See, e.g., Rivera* v. *Buscaglia*, 146 F.2d 461, 465 (1st Cir. 1944) (upholding Puerto Rican tax on federal employees residing in Puerto Rico; "having jurisdiction to tax such compensation" interpreted to mean that taxing entity must have authority to impose income tax and particular federal

[2] By amendment, the phrase, "having jurisdiction to tax such compensation" was shortened to "having jurisdiction." The Historical and Revision Notes to 4 U.S.C. §111 state that "[t]he words 'to tax such compensation' are omitted as unnecessary," demonstrating that this amendment had no substantive effect.

employee must be within taxing jurisdiction of same); *Yerian* v. *Hawaii*, 130 F.2d 786, 789 (9th Cir. 1942) (upholding income tax levy by territory of Hawaii upon federal employees *residing* therein, under Public Salary Tax Act); *Wood* v. *Tawes*, 181 Md. 155, 28 A.2d 850, 853-54 (Md.), *cert. denied*, 318 U.S. 788 (1942) (upholding income tax levy by Maryland upon federal compensation of Maryland *residents*, under Public Salary Tax Act).

This interpretation of the phrase "having jurisdiction to tax" is supported by the plain language of § 108 of the Buck Act, which in substance provides that § 106 (and similar sections) shall not diminish the exclusive jurisdiction of the United States.

While the second sentence of the Buck Act may at first glance appear to constitute a grant of jurisdiction, a close reading of that sentence reveals that it is merely declarative of the effect of the first sentence of the statute. The use of the word "such" to modify the phrase "state or taxing authority" is a reference to a state or taxing authority "having jurisdiction to levy such a tax." Therefore, the reference in the second sentence to "such state" is a reference to a state with territorial (and taxing) jurisdiction over the federal reservation. The statement that such a state "shall have full jurisdiction and power to levy and collect such tax" is in essence a tautology until the remainder of the sentence is considered. The remainder of the sentence permits the state to treat the federal area as if it were "not a Federal area," which is the practical ultimate effect of a removal of sovereign immunity. Since sovereign immunity depended upon the federal status of the reservation, the elimination of sovereign immunity is the equivalent of elimination of the federal status.

While the Public Salary Tax Act made clear that the fact that income was derived from federal employment would not *by itself* bar state taxation of that income, the Buck Act made clear a corollary of that rule, *i.e.*, that the fact that the federal income was earned in a federal area or the fact that the taxpayer was a resident of a federal area would not, in and of themselves, stand

as a bar to state income taxation where the state (or other taxing authority) independently possessed jurisdiction over either the taxpayer or the transaction in which the income was earned. *See Kiker* v. *Philadelphia*, 346 Pa. 624, 31 A.2d 289, 300-01 (Pa.) (dissent), *cert. denied*, 320 U.S. 742 (1943).

The Maine Supreme Judicial Court, in *Morse* v. *Johnson*, ruled that the taxpayer's interpretation of the Buck Act would render the Buck Act redundant and that therefore that interpretation must be rejected. *Id.* at 598. However, the mere fact that the Buck Act was enacted to codify a judicial ruling of this Court does not render the statute "redundant" or a "nullity," for the Public Salary Tax Act would itself be redundant under such reasoning. To the contrary, legislative codifications of judicial rulings are not uncommon.[3] It is not a futile or meaningless gesture to enact into a comprehensive legislative Code a statute which is declarative of existing law; for to declare the law is the very purpose for the existence of the Code.

As pointed out by Chief Justice Maxey in the well reasoned dissent of *Kiker*, interpreting § 106 of the Buck Act as an affirmative grant of jurisdiction would, for example, permit the taxation by Maryland of the income of a resident of Virginia earned within the District of Columbia because the District of Columbia is located within the exterior boundaries of Maryland and belonged to Maryland before Maryland ceded it to the federal government, just as Seavey and Dennett's islands belonged to Maine prior to their cession. Under the State's interpretation, § 106 of the Buck Act would further permit the State of Maryland

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[3] For example, the 1978 amendment to 29 U.S.C. § 626(c), providing for a right to a jury trial in certain civil actions under the Age Discrimination in Employment Act of 1967, was stated in *Lehman* v. *Nakshian*, 453 U.S. 156, 166 (1981) to have been a codification of the holding of *Lorillard* v. *Pons*, 434 U.S. 575, 584-85 (1978).

As another example, the Supreme Court stated in *Foster* v. *Dravo Corp.*, 420 U.S. 92, 97 (1975) that the re-enactment of 50 U.S.C. App. § 459(c)(2), 62 Stat. 604, 615-16 (the original enactment was 54 Stat. 885, 890) was an express codification of the holding of *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 285 (1946).

to tax District of Columbia residents upon their income earned within the District. Obviously, Section 106 was not intended to authorize any such acts.

Petitioner urges upon this Court the better reasoned view of the dissent in *Kiker:*

> It may be that in enacting [§ 106 of the Buck Act] Congress intended to make it crystal clear that when a state of subdivision of a State *had jurisdiction* over the person *or* the property of an individual that person could not resist, with Federal support, the payment of a tax on his wages even though those wages were earned by him in a Federal area, or if he resided in a Federal area and earned wages in a State, that State or its appropriate subdivision could tax those wages without Federal interference. The condition precedent to the taxation by the State or its subdivision of this individual or his wages and salary, was jurisdiction over either him *or* his wages and salary by the taxing authority.
>
> If, as conceded by the majority opinion, a nonresident of Philadelphia could not under the Public Salary Tax Act be taxed on his salary or wages earned in a Federal area, it is difficult to understand how Philadelphia can under [the Buck Act] tax a nonresident's salary or wages earned on League Island.

Id. at 300-01 (emphasis original).

For the foregoing reasons, this Court should grant certiorari to review the judgment of the Maine Supreme Judicial Court as to the issue of whether the Buck Act constituted a grant of taxing jurisdiction to Maine over this federal reservation or only constituted a removal of sovereign immunity against certain state taxation.

II. This Court Should Grant Certiorari With Regard to the Issue Whether Maine's Prorating of Deductions and Exemptions With Regard to Nonresidents Violates the Privileges and Immunities Clause of the United States Constitution.

A. *The Maine Court's Decision Sustaining the Constitutionality of Maine's Proration Statutes Presents an Important Federal Question Which Has Not Been Heard by This Court.*

The Maine court's decision holding Maine's proration-of-exemptions statute, 36 M.R.S.A. §5145, and proration-of-deductions statute, 36 M.R.S.A. §5144-A, consistent with the Privileges and Immunities Clause of the United States Constitution (Art. IV, §2, clause 2) presents an important federal question which will immediately affect the more than 4,000 nonresidents[4] who work at the Portsmouth Naval Shipyard (inferably most from New Hampshire) and uncounted others who reside in New Hampshire but work in Maine. Moreover, because many states have statutes similar to Maine's, *see e.g.*, N.Y. Tax Law §§635, 636 (Consol.); Mass. Gen. Laws c. 62, §3(c) (proration with respect to a nonresident's personal exemptions); Del. Code Ann. tit. 30 §3(c) (proration applied if nonresident's deductions exceed $100); N.M. Stat. Ann. §7-2-11 (proration applied under this statute in *Lung* v. *O'Chesky*, 94 N.M. 602, 617 P.2d 1317 (1980), *appeal dismissed*, 450 U.S. 961 (1981)), discussed below in n.6, p. 15, and because many state residents, undoubtedly numbering in the millions, work out-of-state, the question presented is one of nationwide importance.

Additionally, the issue whether a state can, proportionally or otherwise, deny or reduce nonresident taxpayers' tax *deductions* granted taxpayers, has arisen with some frequency in the state courts and has resulted in conflicting interpretations of this Court's holdings in *Shaffer* v. *Carter*, 252 U.S. 37 (1920) and

[4] Rockingham (N.H.) *Gazette*, June 13, 1984, front page.

Travis v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920). In *Shaffer* and *Travis*, this Court held that, with respect to business-related tax deductions (*e.g.*, depreciation), a state can constitutionally limit a nonresident taxpayer to those business or income-related deductions actually incurred in the taxing state. However, some courts (including the Maine court) have erroneously interpreted this Court's opinions in *Shaffer* and *Travis* as allowing a state to flatly deny nonresident taxpayers *all* deductions for non-business related expenses (*e.g.*, medical expenses). *Goodwin* v. *State Tax Comm'r*, 286 App. Div. 694, 146 N.Y.S.2d 172 (1955), *aff'd*, 1 N.Y.2d 680, 133 N.E.2d 711, 150 N.Y.S.2d 203, *appeal dismissed*, 352 U.S. 805 (1956); *Berry* v. *State Tax Comm'n*, 241 Or. 580, 397 P.2d 780 (1964), *reh. den.*, 241 Or. 588, 399 P.2d 164, *appeal dismissed*, 382 U.S. 16 (1965); *Stiles* v. *Currie*, 254 N.C. 197, 118 S.E.2d 428 (1961). Conversely, other state courts have recognized the limited nature of the Court's holdings in *Shaffer* and *Travis* regarding deductions. *Spencer* v. *South Carolina State Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd on other grounds*, __ U.S. __, 105 S.Ct. 1859 (1985); *Golden* v. *Tully*, 87 App. Div. 2d 1058, 452 N.Y.S.2d 748 (3rd Dept. 1982), *aff'd mem.*, 58 N.Y.2d 1047, 449 N.E.2d 406, 462 N.Y.S.2d 626 (1983); *Friedsam* v. *State Tax Comm'n*, 98 App. Div.2d 26, 470 N.Y.S.2d 848 (3rd Dep't. 1983), *aff'd*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984). Resolution of these conflicting interpretations by state courts of last resort is an appropriate ground for the granting of certiorari (*Cf.* Rule 17.1(b) of this Court), especially since the question presented herein remains one which this Court has never fully considered.[5]

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[5] While the Court dismissed an appeal for want of a substantial federal question in *Lung* v. *O'Chesky*, 94 N.M. 802, 617 P.2d 1317 (1980), *appeal dismissed*, 450 U.S. 961 (1981) (sustaining the validity of a New Mexico statute proportionally denying nonresident taxpayers tax exemptions and deductions granted resident taxpayers), and while the Court's action therein is a decision on the merits, *Hicks* v. *Miranda*, 422 U.S. 332 (1975), the Court has never heard fully briefed and developed arguments with respect to this question. As this Court has indicated on numerous occasions, a decision resting on the cursory

B. *The Maine Court's Decision Sustaining the Constitutionality of Maine's Proration Statutes Conflicts in Principle With Prior Decions of This Court.*

Maine's proration-of-deductions and proration-of-exemptions statutes reduce the amount of tax deductions and exemptions permitted a nonresident taxpayer by the ratio that the nonresident taxpayer's Maine-derived adjusted gross income bears to his adjusted gross income from all sources. The consequence of this proration scheme is that nonresident taxpayers incur a greater Maine tax liability and a higher effective tax rate than similarly situated resident taxpayers, as explained below.

Because they had income in 1980 and 1981 not subject to taxation in Maine, the Barneys' exemptions and deductions were reduced by 26% in 1980 and by 27.5% in 1981. (App. A-6). Computations based upon the Barneys' 1980 and 1981 Maine income tax returns (which were before the Maine court) show that the Barneys paid income taxes to Maine at an effective rate of 1.1% in 1980 and 1.57% in 1981 versus .66% in 1980 and .83% in 1981 for a resident taxpayer with the same amount of income subject to taxation in Maine and with the same exemptions and deductions that the Barneys would have had except for the pro-rating requirement of Maine law. Thus, the effect of the Maine pro-rating requirement is the same as would be the effect of a statute providing that if a nonresident who has income subject to taxation in Maine also has income (as reported on his federal income tax return for the same year) which is not subject to taxation in Maine, then his tax rate on the income subject to taxation in Maine shall be increased proportionate to the amount of his income not subject to taxation in Maine but that the tax

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consideration given an appeal dismissed for want of a substantial federal question is not entitled to the same deference given a ruling after briefing, argument, and written opinion. *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 309 n.1 (1976); *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

rate of the resident who has income not subject to taxation in Maine shall not be so increased. Such a statute would seem to be unconstitutional. *Austin* v. *New Hampshire*, 420 U.S. 656, 663-666 (1975).

This Court held in *Shaffer* v. *Carter*, 252 U.S. 37 (1920), that a state can only constitutionally tax the income of a nonresident earned within the taxing state. This Court further held in *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), that a taxing statute cannot justify discrimination against nonresidents in *its internal* scheme of income taxation by viewing the nonresidents' total (multi-state) tax circumstances.[6] Accordingly, a view of identically situated resident and nonresident taxpayers as determined by this Court properly compares the income of a nonresident which is constitutionally subject to Maine taxation (i.e., the nonresident's Maine derived income), and the tax thereon, with an equal amount of income earned by a resident which is constitutionally subject to Maine taxation (i.e., the resident's income from all sources) and the tax thereon. A clear example of such *similarly situated* taxpayers demonstrates the inequity resulting from the proration statutes:

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[6] In holding in substance (App. A-8) that Maine is not discriminating against the Barneys because they "... will incur a lower effective tax rate on (their) total income than the similarly situated Maine resident" because the Barneys pay no income tax in New Hampshire, the Maine Court not only violates the rule of *Austin* but also fails to take into account the fact that New Hampshire relies heavily on its property tax. Figures published by the United States Department of Commerce, Bureau of the Census, in March, 1985, shortly after the oral argument in the Supreme Judicial Court (which were furnished to the Clerk prior to the decision) show that New Hampshire was sixth, and Maine was twentieth, in the nation in per capita property tax collections in 1983; that New Hampshire per capita property tax collections increased 133% from 1973 to 1983 while Maine's comparable collections increased only 83% (or 63% of the New Hampshire increase) in the same period.

	Resident	*Nonresident*
Maine sourced income	$35,000	$35,000
Income sourced without Maine	-0-	$35,000
Income subject to Maine tax	$35,000	$35,000
Exemptions (3)	$ 3,000	$ 1,500
Deductions	$ 2,000	$ 1,000
Maine tax liability	$ 1,525	$ 1,739
Effective tax rate	4.4%	5.0%

In stating that "a resident and a nonresident are 'similarly situated' when they have the same tota[illegible] as opposed to constitutionally taxable] income" (App. A-7), and that "looking at any nonresident taxpayer's total income, it is clear that any variation between his effective rate and that of a similarly situated Maine resident will depend upon his own State's base rate and tax benefit policy" (App. A-7, 8), the Maine court makes a critical fundamental determination clearly inconsistent with the holdings of this Court in *Shaffer* and *Austin*.

This Court has repeatedly held or stated that unequal taxation of similarly situated resident and nonresident taxpayers runs counter to the anti-discrimination purpose of the Privileges and Immunities Clause. For example, this Court said (long ago) in *Ward* v. *Maryland*, 79 U.S. 418 (1871):

> Beyond doubt these words [Privileges and Immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold

> real estate; to maintain actions in the courts of the State; *and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.*

Id. at 430 (emphasis added). *See also Austin* v. *New Hampshire*, 420 U.S. 656, 662-663 (1975), where this Court noted that a state's scheme of *income* taxation will be subject to a heightened standard of scrutiny.

This Court held in *Travis* v. *Yale and Towne Mfg. Co.*, 252 U.S. 60, 80-81 (1920), that the denial to nonresident taxpayers of tax exemptions granted resident taxpayers without substantial justification violates the Privileges and Immunities Clause, thus recognizing that the denial to nonresidents of income tax benefits granted residents causes the unequal taxation proscribed by that Clause. While the Court's holding in *Travis* is limited by its facts to tax exemptions, its principle may logically be extended to personal (but not business) tax deductions. Personal deductions are like exemptions; they are not derived from nor are they attributable to any specific income of a taxpayer. Accordingly, to grant these tax benefits to resident taxpayers, but not (in full) to nonresident taxpayers, is to disparately treat similarly situated resident and nonresident taxpayers in contravention of *Travis*.

In stating that Maine can constitutionally deny nonresident taxpayers *all* deductions for personal expenses granted resident taxpayers, the Maine court misreads this Court's opinions in *Shaffer* and *Travis*. It is evident from the facts and arguments presented in both *Shaffer* and *Travis* that the Court's holding in each is limited to business, rather than personal deductions. Moreover, the Maine court's construction of *Shaffer* and *Travis* is also inconsistent with the decisions of other state courts which have, implicitly or explicitly, considered the breadth of the holdings in those decisions regarding the deduction issue. *E.g.*, *Spencer* v. *South Carolina State Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd on other grounds*, __U.S.__, 105 S. Ct. 1859 (1985); *Friedsam* v. *State Tax Comm'n*, 98 App. Div.2d 26, 470 N.Y.S.2d 848 (3rd Dept. 1983), *aff'd*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984).

The Supreme Judicial Court's decision is not reconciled with those of this Court by reason of its proffered justification for the discriminatory taxation of nonresidents arising from §5144-A and §5145. In support of its holding, the Supreme Judicial Court states that the proration scheme "effectuates a clearly sufficient State purpose, *viz.*, 'funding' no more than that share of tax benefits that is attributable to income earned within, and therefore taxable by, Maine." (A-7). Close analysis of this rationale reveals that it trespasses upon the very anti-discrimination essence of the Privileges and Immunities Clause as determined by this Court.

The hostility between the Supreme Judicial Court's justification for Maine's discriminatory scheme and this Court's decisions arises from the Supreme Judicial Court's erroneous presumption that personal exemptions and deductible personal expenses are connected or attributable to specific income of a taxpayer. As this Court implicity noted in *Travis* by its disparate holdings with respect to personal exemptions and income-related deductions, and as other courts and commentators have recognized (*see, e.g., Goodwin* v. *State Tax Comm'r*, 286 App. Div. 694, 146 N.Y.S.2d 172 (1955), *aff'd*, 1 N.Y.2d 680, 133 N.E.2d 711, 150 N.Y.S.2d 203, *appeal dismissed*, 352 U.S. 805 (1956); W. Hellerstein, *Some Reflections on the State Taxation of Nonresident's Personal Income*, 72 Mich. L. Rev. 1307, 1343 (1974); M. Solomon, *Nonresident Personal Income Tax: A Comparative Study in Eight States*, 29 Fordham L. Rev. 105, 108 (1960)), personal exemptions, unlike expenses incurred to earn or produce income, are not related to or derived from the income of a taxpayer. Personal exemptions are granted to a taxpayer in a flat amount *without any regard* to the taxpayer's income or expense circumstances. In short, personal exemptions are tax benefits, analogous to a tax rebate, for example, granted by the state of Maine which have no link to the income they serve to reduce. Accordingly, because personal exemptions are not related to the source or amount of a taxpayer's income, it is

irrational to prorate them in the case of nonresidents (but not residents) on the basis of nonresidents' sources and amounts of income, as Maine's proration-of-exemptions statute does.

Similar to personal exemptions, deductible personal expenses are not attributable to specific income of a taxpayer. Unlike income-related expenses, such as the cost of goods sold or depreciation, deductible personal expenses are not incurred by a taxpayer to earn or produce income and thus are not derived from or connected to any particular income of a taxpayer. Moreover, they are not granted, as are business expenses, to determine a taxpayers "net" income from a particular source or activity, but rather for certain socially desirable purposes (*e.g.*, to foster charitable donations, home ownership, etc.). These purposes are not lessened because a taxpayer is a nonresident with out-of-state income. Accordingly, because deductible personal expenses are not derived from any particular income of a taxpayer, and because a nonresident's out-of-state income does not affect the purposes for which they are generally granted, it is irrational to prorate such deductions on the basis of a nonresident's, but not a resident's, in-state and out-of-state income.

Once it is recognized that tax exemptions and deductible personal expenses are separable tax benefits granted by Maine without regard to the source or amount of a taxpayer's income, the conflict between the justification offered by the Maine court and the decisions of this Court becomes apparent. Because of the proration statutes, Maine is proportionally denying nonresident taxpayers tax benefits granted resident taxpayers because nonresidents have out-of-state income (*e.g.*, income unrelated to that tax benefit) not taxable by Maine. The reason, of course, that nonresidents have income not taxable by Maine is that they are nonresidents (*e.g.*, taxpayers over whom Maine has only limited taxing jurisdiction). In other words, Maine is proportionally denying nonresidents tax benefits granted similarly situated residents solely because they are nonresidents. As this Court stated in *Toomer* v. *Witsell*, 334 U.S. 385 (1948):

> Like many other constitutional provisions, the Privileges and Immunities Clause is not an absolute. *It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.*

Id. at 396 (emphasis supplied). As demonstrated, the law Court's proffered justification purports to do precisely that proscribed by *Toomer*.

Maine compounds the discrimination inherent in its prorating requirement in the following way. Maine statutory law requires every nonresident who earns income in Maine to include in the Maine income tax return the nonresident must file, income not subject to taxation in Maine. Maine statutory law further provides that the exemptions and deductions otherwise available to all Maine taxpayers must be reduced, in the case of the nonresident, by the same percentage the total income exceeds income subject to taxation in Maine. 36 M.R.S.A. §§5140, 5144A, 5145. In addition, if the nonresident who has income subject to taxation in Maine is married and he and his spouse have filed a joint federal income tax return for the same year, they must file a joint return in Maine and report all income reported on the federal return, including income not subject to taxation in Maine, even income of the spouse. 36 M.R.S.A. §5141. Since Maine law requires that exemptions and deductions must be prorated as described above on the basis of the total income reported in the federal return, Maine law provides, in effect, that the spouse's income shall be treated as if it were income of the nonresident who has income subject to taxation in Maine for the purpose of computing the tax on the income of the nonresident subject to taxation in Maine.[7]

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[7] Petitioner recognizes that petitioner's spouse was not a named party below and therefore is not a party to this petition. However, she is a party in interest. The Maine statute requiring her to file a joint return in Maine if she exercises (with petitioner) her right to file a joint federal return, makes her such. The

In *Hoeper* v. *Tax Commission of Wisconsin*, 284 U.S. 206 (1931), it was held that a Wisconsin statute was arbitrary and discriminatory and therefore denied due process and equal protection, which authorized an assessment of income tax to a husband computed on the combined total of his income and his wife's income although under Wisconsin law the husband had no interest in, or control over, the property or income of his wife. This court held as follows:

> The appellant says that what the state has done is to assess and collect from him a tax based in part upon the income received by his wife, and that such exaction is arbitrary and discriminatory, and consequently violative of the constitutional guarantees (of due process and the equal protection of the law). (284 U.S. at 214.) The exaction is arbitrary and is a denial of due process. (284 U.S. at 218).
>
> We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another, is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. (citation omitted). (284 U.S. at 215).
>
> What Wisconsin has done is to tax as a joint income that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes. (284 U.S. at 216.)

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decision of the Maine court makes a number of references to "the Barneys," "their income," "they." (App. A-6, A-7).

Petitioner also recognizes that the effects of the joint return requirement were not briefed below (but were argued orally to the Maine Supreme Judicial Court, although not treated in the opinion). Petitioner now makes this argument under claim that this argument is but another aspect of the issue raised below as to prorating and therefore petitioner may properly so argue in this Court. *Dewey* v. *Diamond*, 173 U.S. 193, 197-198 (1899).

This Court also rejected Wisconsin's contentions that the statutory provisions involved were valid as reestablishing what was formally an incident of the marital relationship and that the statutes in question were a regulation of marriage. It was held that the statutory provisions in question clearly were revenue measures, not marriage regulation statutes. 284 U.S. at 217-218. In *Edwards* v. *Commissioner of Internal Revenue*, 660 F.2d 1268, 1271 (9th Cir. 1982), the Ninth Circuit held, on the authority of *United States* v. *Mitchell*, 403 U.S. 190, 196-197 (1971), that a married individual is taxable on the earnings of his or her spouse only to the extent that the laws of the state of residence grant that individual a vested property or ownership interest in the spouse's earnings. In this case, Maine, not being the state of residence of petitioner or his spouse, has no jurisdiction to determine petitioner's interest in the income of his wife. In point of fact, both New Hampshire and Maine law give a married woman separate wonership and control of her income and property. N.H.R.S.A. §4601; 3 M.R.S.A. §§161-163.

Conclusion

For the foregoing reasons, this Court should grant certiorari to resolve the conflicts between the Supreme Judicial Court's decision and applicable decisions of this Court.

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APPENDIX A

STATE OF MAINE
YORK, SS:

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. *CV-83-622*

ROBERT W. BARNEY,
PETITIONER,
v.
R.L. HALPERIN, STATE TAX ASSESSOR,
RESPONDENT.

O R D E R

Petitioner Barney is a New Hampshire resident who is employed at the Portsmouth Naval Shipyard. Petitioner's wife is employed in New Hampshire. For purposes of the Maine income tax, the Barneys itemized deductions and personal exemptions for 1980 and 1981 were prorated by the ratio of Maine income to personal income. In April 1983, the Barneys filed for a refund of their taxes, claiming that their deductions and exemptions should not have been prorated. The State Tax Assessor denied the refund and petitioner has appealed that decision under the Maine Administrative Procedure Act and M.R.Civ.P. 80(c).

Petitioner has two claims in support of his refund. First, he claims that Maine has no jurisdiction to tax the income earned by nonresidents in a federal enclave located in the State. This claim was rejected by the Law Court in *Morse* v. *Johnson*, 282 A.2d 597 (Me. 1971) on virtually identical facts. This Court is bound by that decision.

Petitioner's second argument is that prorating personal exemptions and itemized deductions violates the privileges and immunities clause of the United States Constitution, Article IV §2. For

the reasons explained below, the Court finds that this treatment of deductions is constitutionally permissible.

There is no question that a state can tax income produced in the state even when it is earned by a nonresident. *Travis* v. *Yale and Towne Mfg. Co.*, 252 U.S. 60 (1920); *Shaffer* v. *Carter*, 252 U.S. 37 (1920). It is also clear that a state may constitutionally permit a nonresident to take only those deductions connected with income arising from sources within the taxing state. *Travis*, 252 U.S. at 75; *Lung* v. *O'Chefsky*, 617 P.2d 1317, 1319 (N.M. 1980), *appeal dismissed*, 450 U.S. 961 (1981).

The Maine Income Tax seeks to achieve both of these permissible goals. Under Maine law, a nonresident is taxed by Maine on income earned in Maine. The nonresident is allowed a fraction of the personal exemptions and deductions allowed to residents. That fraction is the ratio of the nonresident's Maine income to his total income. Thus, the nonresident is taxed on his income from Maine sources reduced by prorated exemptions and deductions.

These tax provisions are designed to allow exemptions and deductions from a nonresident's Maine income and, at the same time, to prevent the taxpayer from taking full deductions and exemptions against his tax liability in each of the states in which he is taxed. The problem presented in this case is that because New Hampshire has no state income tax, the petitioner has no corresponding exemptions and deductions in his home state.

Petitioner argues that Maine should only be allowed to prorate his deductions that are connected with Maine-sourced income. This argument must fail. Under *Shaffer* and *Travis*, the state may constitutionally limit a nonresident's deductions to business deductions. These cases have been interpreted to permit a state not to allow a nonresident any deductions for personal activities. Non-business deductions have been found to be more appropriately allowed by the state of the taxpayer's residence. *Goodwin* v. *State Tax Commission*, 286 App. Div. 694, 146 N.Y.S.2d 172, *aff'd* 1 N.Y.S.2d 680 (1975).

Furthermore, in at least two cases, courts have upheld similar tax schemes against claims that they unconstitutionally denied full deductions to nonresidents. *Lung* v. *O'Chesky*, 617 P.2d 1317, 1319 (N.M. 1980); *Wheeler* v. *State*, 127 Vt. 361, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed* 450 U.S. 961 (1981). The Court finds that Maine's treatment of deductions is constitutionally permissible.

Petitioner also contends that prorating his personal exemptions violates the privileges and immunities clause. Under the Maine Income Tax laws, a resident taxpayer may exempt $1,000 and an additional $1,000 for each dependent from taxation. 36 M.R.S.A. §5126. A nonresident's exemptions are prorated under 36 M.R.S.A. §5145.

It is clear that Maine could not simply deny personal exemptions to all nonresidents. The United States Supreme Court struck down a state tax system which allowed personal exemptions for residents and no personal exemptions for nonresidents. *Travis* v. *Yale and Towne Mfg. Co.*, 252 U.S. 60 (1920). The *Travis* court found that since there was no reasonable ground for this diversity of treatment, the provision abridged the privileges and immunities clause. *Id.* at 79.

The purpose of 36 M.R.S.A. §5145 is legitimate, even though the proration of exemptions operates to deny the petitioner the full amount of the exemptions which would be allowed to a Maine resident with the same income derived from any source. Under §5145, the amount of a nonresident's exemptions are tied to the income he earns in this state. The validity of §5145 is not altered because the petitioner is not required to pay any tax on the income earned in his state of residence. This benefit is irrelevant to his treatment under Maine tax laws.

The concept of a prorated personal exemption has been upheld by the Supreme Court of New Mexico in circumstances very similar to Barney's *Lung* v. *O'Chesky*, *supra*. In *Lung*, New Mexico, like Maine, relied upon the state of residence to

allow the corresponding percentage of deductions and exemptions to bring the total to 100% of those allowed to residents. The taxpayers contended that this reliance failed because Texas, their state of residence, had no income tax. The court declared in upholding the proration

> It is clear that a state may tax income produced in that state by a nonresident . . . . It is equally clear that a state may not tax the income of a nonresident which is not produced in the state. It follows that a state need only accord deductions and exemptions to non-residents for the portion of their income which is earned from within the state. If the state has no jurisdiction to tax the income from a particular source, there is no reason for it to extend exemptions and deductions to a non-resident based on that income . . . . The reason a state may give a resident full deductions and exemptions even though a portion of his income is earned outside the state is that the state has the power to tax all the income of a resident, wherever earned.

For the foregoing reasons, the appeal is DENIED on the issues of jurisdiction and the constitutionality of deductions.

The order shall be: APPEAL DENIED.

DATED: Oct 4, 1984

S/ Robert L. Browne
Robert L. Browne
Justice, Superior Court

APPENDIX B

MAINE SUPREME JUDICIAL COURT
REPORTER OF DECISIONS
DECISION NO. 3778
LAW DOCKET NO. YOR-84-437

ROBERT W. BARNEY

v.

STATE TAX ASSESSOR

ARGUED MARCH 15, 1985
DECIDED APRIL 2, 1985

Before McKUSICK, C.J., NICHOLS, VIOLETTE, WATHEN, GLASSMAN, AND SCOLNIK, JJ.

SCOLNIK, J.

Robert W. Barney, a New Hampshire resident, appeals from a judgment of the Superior Court, York County, affirming a decision of the State Tax Assessor that denied a refund of his Maine income tax for the years 1980 and 1981. Barney challenges the authority of the State to tax his income earned at the Portsmouth Naval Shipyard, a federal enclave within Maine, on the alleged ground that it has not regained the jurisdiction to tax there that it ceded to the federal government in 1863. He further argues that the Privileges and Immunities Clause of Article IV of the United States Constitution bars Maine from prorating his deductions and exemptions according to the ratio of his Maine-earned to total income. Finding no merit in either contention, we affirm the judgment.

Appellant's first contention is disposed of by our decision in *Morse* v. *Johnson*, 282 A.2d 597 (Me. 1971). By the Buck Act, 4 U.S.C. § 106, Congress in 1940 receded to Maine the jurisdiction to tax all incomes earned in a federal enclave within the

State's geographical boundaries. *Howard* v. *Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624, 627-28, 73 S.Ct. 465, 467, 97 L.Ed. 617 (1953); *United States* v. *Lewisburg Area School Dist.*, 539 F.2d 301, 308 (3d Cir. 1976). The Act removed the dam of federal exclusivity to that extent, allowing Maine's jurisdiction to flow back. *See* 1 M.R.S.A. § 1.

Barney and his wife earned in Maine 74% of the "adjusted gross income" declared on their federal tax return in 1980, and 72.5% in 1981. Accordingly, they were permitted by 36 M.R.S.A. §§ 5144-A and 5145[1] to deduct and exempt on their Maine income tax returns only 74 and 72.5 percent respectively of the deductions and exemptions they would have been allowed as residents by 36 M.R.S.A. §§ 5125 and 5126 in those years. They were, of course, only required to pay tax to Maine on the portion of their income earned in Maine, since their New Hampshire income is constitutionally beyond this State's reach. *Shaffer* v. *Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920). The balance of their income was presumably entirely tax-free, since New Hampshire levies no State tax on earned income. They had, therefore, no other opportunity to claim any tax benefits beyond the portion allowed them by Maine.

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[1] 36 M.R.S.A. § 5144-A provides that,

> [t]he itemized deductions of a non-resident individual shall be determined in accordance with the provisions for a resident individual as contained in section 5125 and multiplied by a percentage arrived at by dividing the non-resident's adjusted gross income from sources within this State by his adjusted gross income he would be required to report if he were a resident.

36 M.R.S.A. § 5145 provides that,

> [a] non-resident individual shall be allowed the personal exemptions allowed to resident individuals under section 5126, multiplied by a percentage arrived at by dividing the non-resident individual's adjusted gross income from sources within this State by his adjusted gross income he would be required to report if he were a resident.

Concluding that Maine thereby denied them "substantial equality of treatment" with its own residents, without a justification satisfying the ideal of interstate comity enforced by the Privileges and Immunities Clause, *Austin* v. *New Hampshire*, 420 U.S. 656, 665, 95 S.Ct. 1191, 1197, 43 L.Ed.2d 530 (1975),[2] the Barneys claim a refund of the amount by which their tax would have been reduced had they been allowed 100% of a resident's deductions: a total of $271.52. We think that, not only is Maine's proration scheme "not more onerous in its effect" upon non-residents, *Shaffer* v. *Carter*, 252 U.S. at 52, 40 S.Ct. at __, but it also effectuates a clearly sufficient State purpose, *viz.*, "funding" no more than that share of tax benefits that is attributable to income earned within, and therefore taxable by, Maine. *Id.* at 57, 40 S.Ct. at 227; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 75-76, 40 S.Ct. 228, 230, 64 L.Ed. 460 (1920).

We do not agree with the appellant that Maine's scheme imposes a higher effective rate of tax on non-residents than on similarly situated residents. A resident and a non-resident are "similarly situated" when they have the same total income. Maine prorates deductions and exemptions exactly in proportion to the share of total income that it constitutionally may tax. This ensures that, like the non-resident in *Shaffer* v. *Carter*, the taxpayer is "called upon to make no more than his ratable contribution to the support of the state government." *Austin* at 664, 95 S.Ct. at 1197. Maine's scheme is neutral in its effect on residents and non-residents. Looking at any non-resident taxpayer's total income, it is clear that any variation between his effective rate and that of a similarly situated

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[2] Article IV, Section 2, Clause 1 of the United States Constitution provides that

> "[t]he Citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several States."

"For purposes of analyzing a taxing scheme under the Privileges and Immunities Clause the terms 'citizen' and 'resident' are essentially interchangeable." *Austin* v. *New Hampshire* at 662, n.8, 95 S.Ct. at 1195, n.8.

Maine resident will depend on his own State's base rate and tax benefit policy. In fact, like the appellant here, *every* New Hampshire resident whose income is partly earned in Maine and partly in New Hampshire will incur a lower effective tax rate on his total income than the similarly situated Maine resident. Maine's approach does not impose a greater burden on non-residents as a class, nor on any single taxpayer because he is not a resident.

In arguing that Maine must allow him the deductions and exemptions taken by a resident with the same *Maine* adjusted gross income, irrespective of how much other income he has, the appellant misapprehends the nature of deductions and exemptions. They are nothing but *tax* benefits, without any independent existence. The extent of Barney's eligibility for them is properly linked to the extent of his liability for taxes.

The United States Supreme Court has held that a State need not allow deductions not incurred in producing income within the State. *Shaffer* v. *Carter*, 252 U.S. at 57, 40 S.Ct. at 227. The companion case refuted the argument that New York improperly denied a deduction for home mortgage interest paid in Connecticut because, "there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc. in the case of non-resident taxpayers to such as are connected with the income arising from sources within the taxing state. . . ." *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. at 75-76, 40 S.Ct. at 230.[3] Maine takes a more generous approach. Recognizing that, like Barney, a non-resident taxpayer may have more "personal" than "business" deductions,

[3] Several States have followed these decisions in denying non-residents *any* deductions not connected with producing income within the taxing State. *See, e.g., Goodwin* v. *State Tax Comm'n*, 146 N.Y.S.2d 172 (App. Div. 1955), *aff'd mem.*, 133 N.E.2d 711 (N.Y. 1956), *app. dis.*, 352 U.S. 805 (1956); *Berry* v. *State Tax Comm'n*, 397 P.2d 780 (Ore. 1964), *reh. den.*, 399 P.2d 164, *app. dis.*, 382 U.S. 16 (1965). In each of those cases the United States Supreme Court rendered a decision on the merits of the Privileges and Immunities Clause challenge by dismissing the appeal for want of a substantial federal question. *Hicks* v. *Miranda*, 422 U.S. 332, 343-45, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

Maine allows that portion that is funded by income earned in Maine. *Gordon* v. *State Tax Assessor*, 455 A.2d 57 (Me. 1983). The best way to determine for all taxpayers what portion is attributable to Maine-earned income is to prorate that income against the taxpayer's total income.

The same approach is taken with "personal exemptions," tax benefits that compensate for the cost of living, not the cost of producing income. While Maine may not entirely deny exemptions to all non-resident taxpayers, *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. at 79-81, 40 S.Ct. at __, it may disallow that portion that corresponds to their actual out-of-state income. *See id.* at 81, 40 S.Ct. at __; *Lung* v. *O'Chesky*, 94 N.M. 802, 617 P.2d 1317, 1319 (N.M. 1980), *app. dis.*, 450 U.S. 961 (1981) (upholding New Mexico's proration scheme). Maine's obligation to fund no more than a pro-rata share of a non-resident's tax benefits is a "necessary corollary" of the constitutional prohibition against taxing his out-of-State income. *Goodwin* v. *State Tax Comm'n*, 146 N.Y.S.2d at 177; *Shaffer* v. *Carter*, 252 U.S. at 57, 40 S.Ct. at 227.

The entry is: Judgment affirmed.

All concurring.

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APPENDIX C

AMENDMENT XIV, SECTION 1, OF THE UNITED STATES CONSTITUTION:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE IV, SECTION 2 OF THE UNITED STATES CONSTITUTION:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

4 U.S.C. §106 (THE BUCK ACT):

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

53 STAT. 575

SEC. 4. The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

4 U.S.C. §111 (THE PUBLIC SALARY TAX ACT):

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or any agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

1822 MAINE LAWS 146

That there be and hereby is ceded to the United States the jurisdiction over Dennet's Island, on the East side of Piscataqua River, within the State of Maine, now belonging to the United States, and occupied as a Navy Yard: Provided, however, that this State shall have concurrent Jurisdiction with the United States, over said Island, so far as that all civil and criminal processes, issued under the authority of this State, may be executed on any part of said Island, or in any building erected on the same.

1863 MAINE LAWS 205

Jurisdiction is hereby granted and ceded to the United States of America over such portion of Seavey Island in the town of Kittery, as may be purchased for the purpose of using the same as a part of the navy yard located in that town, and consent is hereby given to the purchase of the same by the United States; provided always that this State shall retain and does retain concurrent jurisdiction with the United States in and over all lands hereby ceded so far as that all Civil and all criminal processes issuing under the authority of this state may be executed on said lands and in any buildings thereon, or to be erected thereon in the same way and manner as if jurisdiction has not been granted as aforesaid.

36 M.R.S.A., CHAPTER 807

§ 5140. Nonresident individuals—taxable income

The taxable income of a nonresident individual shall be that part of his federal adjusted gross income from sources within this State determined by reference to section 5142 less with deductions and personal exemptions provided in this chapter.

§ 5141. Husband and wife.

1. **Separate federal return.** If the federal taxable income of husband and wife, both nonresidents of this State, is determined on a separate federal return, their taxable incomes in this State shall be separately determined.

2. **Joint federal return.** If the federal taxable income of husband and wife, both nonresidents, is determined on a joint federal return, their tax shall be determined in this State on their joint taxable income.

3. **One spouse a nonresident.** If either husband or wife is a nonresident and the other a resident, separate taxes shall be

determined on their separate taxable incomes in this State on such forms as the assessor shall prescribe unless both elect to determine their joint taxable income in this State as if both were residents. If a husband and wife file a joint federal income tax return but determine their taxable income in this State separately, they shall compute their taxable incomes in this State as if their federal adjusted gross incomes had been determined separately.

§ 5144-A. Itemized deductions

The itemized deductions of a nonresident individual shall be determined in accordance with the provisions for a resident individual as contained in section 5125 and multiplied by a percentage arrived at by dividing the nonresident's adjusted gross income from sources within this State by his adjusted gross income he would be required to report if he were a resident.

§ 5145. Personal exemptions

A nonresident individual shall be allowed the personal exemptions allowed to resident individuals under section 5126, multiplied by a percentage arrived at by dividing the nonresident individual's adjusted gross income from sources within this State by his adjusted gross income he would be required to report if he were a resident.